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No. 88-74

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE INGERSOLL MILLING MACHINE COMPANY,
and WALDRICH SIEGEN WERKZEUGEMASCHINEN GmbH,

Petitioners,

—v.—

THE HYDRIL COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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In its opposing brief, Hydril argues that if the district and appellate court had observed the standards for granting summary judgment and for appellate review thereof, but had misapplied those standards to the facts of the case, that would not be a basis for this Court to grant petitioners' application. Therefore, Hydril argues, certiorari is inappropriate in this case.

Hydril mistakes the basis of the petition. The petition urges this Court to grant certiorari because the two lower courts departed from the requirements of Rule 56 and because the case is of general importance. If Rule 56 comes to be applied as in this case, litigants' constitutional right to a jury trial will be vio-

lated as petitioners' have been in this case. The correction of an erroneous decision by the lower courts is the result but it is not the reason for the writ to be granted.

A review of the reported decisions in the various circuits leaves no doubt it is the accepted and usual course of judicial practice under Rule 56 that neither the trial judge nor the appellate court is to make creditability determinations, weigh evidence or draw from the facts legitimate inferences for the movant. The evidence of the non-movant is to be believed and viewed in the light most favorable to him. All justifiable inferences are to be drawn in his favor.[1]

Petitioners are not contending that "a district court must mechanically recite each piece of evidence offered by a non-moving party and write out its explanation for why that evidence is irrelevant, immaterial or insufficient to raise a genuine issue of fact." (Hydril Brief, p. 13) While it is true that there is no requirement that the trial judge make findings of fact[2] lower courts must not be free to grant summary judgment and thus deprive a party of its constitutional right of trial by jury without analyzing and evaluating the non-movant's evidence. The district court did not do this. It decided from an examination of the record before it that "Hydril wins." Petitioners' Appendix 2A. It then summarized Hydril's evidence that supported its conclusion. On appellate review, the Court of Appeals adopted the District Court's opinion. It is this disregard of the requirements of Rule 56 in unpublished opinions to which we object. We do not ask the Court to review the evidence, but we submit this reply to Hydril's opposing memorandum because it presents only a version of the evidence and the inferences to be drawn that is favorable to Hydril.

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1 See Fitzwater et al., *Recent Summary Judgment Jurisprudence for the Fifth Circuit Practitioner*, 5 Fifth Cir. Rptr. 769 (1988).

2 This court has noted that "In many cases, however, findings are extremely helpful to a reviewing court." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 222, 106 S.Ct. 2505 (1986).

I.

The issue of the contracting parties' intention is not appropriately decided on a motion for summary judgment

The district court decided for Hydril because it believed it was authorized to interpret, on summary judgment, the contract once it had characterized the contract as unambiguous. But the purpose of contract interpretation is to discern the actual intention of the parties, the intention of both parties if they are the same, or the actual intention of one party if the other party knew or had reason to know what it was. The purpose of contract interpretation is not to give effect to a meaning of words that neither party in fact gave them.

In this case the district court held the parties bound to a meaning that seemed clear to the court, "it is not plausible to contend that the parties contemplated the possibility that the contingencies could be resolved in some way outside the scope of the second provision." Petitioners' Appendix p. 4. If that conclusion did not reflect the intention of the parties it was wrong for the court to make a contract for the parties that they did not make.

In its opposing brief Hydril emphasized that the court held that since both sides contended the language of the contract was unambiguous, that that made the contract unambiguous and hence an issue of law for the court to decide. But each side argued for a dramatically different interpretation of the contract.

In the lower court Hydril took the position that the page 1 and 11 clauses meant something the words do not say, that is, that until a writing was executed by both parties documenting the resolution of the contingency items, the items remained "unresolved," even if the parties had in fact agreed to the terms and conditions to be incorporated in this writing. Hydril insisted, therefore, that without such documentation it is entitled to the return of all its progress payments regardless of whether or not the contingencies had been agreed to, and regardless of Waldrich Siegen's performance of the contract.

Waldrich Siegen's and Ingersoll's position was that the page 11 clause as written was unambiguous and stated only that once the contingency items had been agreed to, a writing would be executed by the parties documenting that fact. Therefore, Waldrich Siegen and Ingersoll insisted that the words of the page 11 clause did in no way require the automatic return of Hydril's progress payments upon proof that a writing had not been executed.

Furthermore, the court considered and then relied on extrinsic evidence favorable to Hydril without acknowledging the existence of contrary evidence favorable to petitioners to support its interpretation of the contract. This was not proper on summary judgment because the evidence was in conflict. If the court was going to consider extrinsic evidence, and if petitioners' evidence showed there was a dispute about the meaning of the contract, the district judge was bound to wait until he heard the complete testimony at trial before ruling on the effect of that conflicting extrinsic evidence and deciding whether the court or jury should decide how the contract should be interpreted.

II.

There were genuine issues of material fact

In its opposing brief Hydril insists that there were no genuine issues of material fact before the Court. It focuses on two alleged undisputed facts to support its conclusion.

First, Hydril contends that there was no dispute that the parties entered into a contract for a manufacturing system with related tooling, fixtures and N/C programming and that a formalized executed agreement in writing as to a tooling package, a fixture package and a software package were required before Hydril would lose its right under the contract, if it were not satisfied, to a full refund of its progress payments. While Hydril witnesses testified at deposition to as much, and the district court stressed this point in granting summary judgment, Waldrich Siegen's proposal clearly offered for sale two Ingersoll CNC V/H Machine Tools. RE 12, p. 1 of proposal. Section

III of its proposal identified and described the machine tool's features to include an automatic tool changer and a CNC control. There was no mention of tooling, fixtures or N/C programming as integral parts of the machining system that Waldrich Siegen offered to sell. RE 12, pp. 12-19 of proposal. Hydril's Purchase Order clearly identifies the machine tool described in Waldrich Siegen's proposal but amended it in certain respects labeled as contingencies. One contingency was that the definition of the "production and accuracy guarantee" would be defined after Ingersoll had completed guaranteed times on all ram BOP body configurations and after development of associated N/C programming, tooling and fixturing concepts, costs and schedule proposals by Ingersoll. RE 14. There were no contingency items related to firm contracts for tooling, fixtures or N/C programming at agreed upon prices.[3] RE 14.

Hydril ignores this language and insists that the parties entered into a conditional contract to purchase an entire manufacturing system designed to manufacture "many different sized BOP parts that Hydril would be certain would efficiently and effectively manufacture blow-out preventers.

Furthermore, the petitioners' witnesses flatly disputed this interpretation of the contract. Tom Birchall, the Ingersoll representative who executed the contract on behalf of Waldrich Siegen, testified that discussion of a turnkey system did not even surface until long after the contract was formed. (V-4 Ex. 53, Birchall T 138-139) He testified that there were discussions

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3 The exact language of this contingency item was as follows:

"(1) SECTION II, PAGES 2 & 3—PRODUCTION AND ACCURACY GUARANTEE.

•WILL BE DEFINED AFTER COMPLETION OF "GUARANTEE TIMES" ON ALL RAM BOP BODY CONFIGURATIONS AND AFTER DEVELOPMENT OF ASSOCIATED N/C PROGRAMMING, TOOLING AND FIXTURING CONCEPTS, COST AND SCHEDULE PROPOSALS, BY INGERSOLL.

DEVELOPMENT OF "GUARANTEE TIMES" AND ASSOCIATED SUPPORT PROPOSALS BY INGERSOLL WILL BE AT NO COST TO HYDRIL."

about additional hardware and equipment necessary to run Hydril's parts and that Hydril wanted a source of supply for all the things needed to support a manufacturing system and that Ingersoll was expected to propose a fixturing system, and a programming system because that was what Hydril desired, (V-4 Ex. 53, Birchall T 425-426) but he denied that the elements that would convert the sale of a machine tool into the sale of a manufacturing system were part of the contract. V-4, Ex. 53, Birchall T 181, 238, 242, 310-311, 423-424, 430, 738-740.

As a second illustration, in its opposing brief, Hydril makes a repeated effort to persuade the reader that there was a specific clause in the contract that required that the resolution of the contingency items be in writing and that Ingersoll admitted this. This is not the fact.

In its opposing brief, Hydril places the two clauses together as if that is the way they appeared in the contract. They did not. The contingency clause was up front on page one. The documentation claim was 10 pages away on page 11. It said nothing about the consequence of failure to document the resolution of the contingency items.

In an effort to support its misstatement of the actual contract language, Hydril claims that petitioners' witnesses were in accordance with "the plain terms of the contract"—that Hydril would be refunded its money if the contingency items were not resolved in writing. Hydril misrepresents this testimony.

Tom Birchall executed the contract. As hard as Hydril's counsel tried, Birchall would not agree that the page 11 clause meant what Hydril was trying to force it to mean.

Birchall testified that he discussed the page 1 and page 8 clauses with Fusco, a Hydril employee, but there was no discussion of the page 11 clause. He admitted that he did not take any exception to the page 11 clause and saw no reason for it not to be followed. V-4 Ex. 53, Birchall T 187. He repeatedly testified on cross-examination that while he agreed that he was willing to be bound by the page 11 clause (V-4 Ex. 53, Birchall T 188), he did not agree that the page 11 clause meant that the parties

intended that Hydril would get all its money back if a written change order was not prepared and executed by both parties. V-4 Ex. 53, Birchall T 189. Furthermore, Birchall testified that while Ingersoll and Waldrich Siegen had agreed to reduce the resolution of the contingency items to writing, they were, in fact, reduced to writing and Ingersoll and Waldrich Siegen were prepared to sign the change order except for one disagreement. V-4 Ex. 53, Birchall T 310-311.

Hydril's trial attorney tried to force Birchall to agree that the reason for the page 11 clause was to avoid any misunderstanding between the parties as to whether they actually had a firm agreement on the open items. However, Birchall would not agree. Birchall testified as follows:

> We had agreed that the contingency items should be reduced to writing, and they were reduced to writing, and as I stated earlier in my testimony, we were prepared to sign those documents, except for one disagreement over the amount of hardware that was being provided. V-4 Ex. 53, Birchall T 294.

Birchall testified that bonnets or bonnet hardware were never discussed by the parties at the time of the formation of the contract. V-4 Ex. 53, Birchall 272, 284

As for Enfield, Belz and Feisel, the other three Rule 30(b)(6) witnesses, none of these witnesses had anything to do with the negotiation about the contract language. Belz and Feisel were half-a-world away in West Germany. They never even saw the Hydril purchase orders before Birchall accepted them. Ron Enfield, an Ingersoll employee with a shop background, was assigned in April, 1982, about a month after the contract was signed, to act as the coordinator of the project. He had nothing to do with the negotiation of the terms of the contract or its execution. His job was to move the project forward; to see that Waldrich Siegen completed "guarantee times" on all of Hydril's ram BOP body configurations, and that Ingersoll completed the development of "associated N/C programming, tooling and fixturing concepts, cost and schedule" proposals

before the definition of "production and accuracy guarantee" was agreed to by the parties. RE 14.

Hydril selected out of context several of Enfield's answers to several leading questions which suggest that he believed the parties intended the resolution of the contingency items would be by a writing. This is the very evil which this case presents. Hydril picks and chooses its evidence, then claims it is worthy of summary judgment. However, his deposition in its entirety shows that Enfield did not fully understand what Hydril would later contend he was agreeing to. Enfield did not agree that Hydril was entitled to all its money back absent a written agreement as to the resolution of the contingency items. Furthermore, Enfield did testify that in September 1982 the contingency items were resolved to both parties' satisfaction and that Fusco of Hydril had given him a retyped copy of the schedule setting forth the guaranteed times. He further testified that the part of addendum 1, the comprehensive change order, that Ingersoll did not agree to was the quantities of fixtures to hold the bonnets. V-4 Ex. 55, Enfield T 521-525.

Hydril refers to a memo Feisel, an employee of Waldrich Siegen who lived and worked in Germany, wrote on September 20, 1982, RE 33, 212-214 (properly dated September 21, 1982), as a smoking gun, but Hydril does not tell the Court Feisel's explanation for that memo. With respect to that memo, Feisel explained that he was concerned about Hydril's leverage because of the provision, but he was not passing any kind of judgment as to the legal right of Hydril to get its money back.

III.

The Petitioners properly raised the issue of justifiable excuse for not executing the written change order

Hydril argues that the petitioners are barred from raising the claim that they were excused from signing the change orders by reason of Hydril's conduct in including additional requirements (in the July change orders) beyond those agreed to in the March 11 contract, and by Hydril's refusal either to withdraw the requirements or to pay Ingersoll additional sums for supplying the additional equipment.

In paragraphs 25 through 41 of its first amended counterclaim, the petitioners set forth the principal facts related to this claim. R 643-644. The petitioners alleged that at Ingersoll's request, Hydril modified Addendum No. 1 so that it reflected the parties' resolution of all items agreed to in their Rockford agreement, and in agreements reached at meetings thereafter, except with respect to the number and size of certain fixturing equipment that Hydril had specified it had agreed to purchase, ¶ 40, but that petitioners did not sign the change orders because the change orders did not accurately reflect the agreement reached at the Rockford meeting with respect to the number of sets of bonnet fixtures which defendants would furnish for the agreed upon price, and because the change orders did not take into account certain additional costs of approximately $47,000.00 which defendants would incur in manufacturing, at Hydril's request, all of the pallets for the blowout preventer bodies to conform to the length of the pallets for the bonnets ¶ 41.

Rule 7(c) of the Federal Rules of Civil Procedure states that when a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, if justice so requires, shall treat the pleading as if there had been a proper designation.

In this case the issue of a justifiable excuse was presented to the district court and to the appellate court. It was raised and simply ignored.

Respectfully submitted,

/s/ JOHN DOAR

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